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IN THE

# Supreme Court of the United States

OCTOBER TERM—1965

No. 748

T. ROLAND BERNER and ARTHUR S. LESSER, Executors of The Estate of WILLIAM KAPELL, deceased,

*Petitioners,*

—v.—

BRITISH COMMONWEALTH PACIFIC AIRLINES, LTD., a Foreign Corp., and BRITISH COMMONWEALTH PACIFIC AIRLINES, LTD., now doing business as QANTAS EMPIRE AVIATION LTD., a Foreign Corp.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR RESPONDENTS IN OPPOSITION

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### Opinions Below

The opinion of the District Court is reported at 219 F. Supp. 289. The opinion of the Court of Appeals for the Second Circuit (App. A of Petition) is reported at 346 F. 2d 532.

### Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

## Questions Presented

1. Whether the Court below correctly held that the District Court erred in rejecting the jury verdict in favor of respondents, assuming the jury's role as fact-finder and granting judgment *non obstante veredicto* to petitioners?

2. Whether the Court below could set aside, as an abuse of discretion, the alternative grant of a new trial by the District Court?

3. Whether the Court below correctly held that the doctrine of collateral estoppel was inapplicable under the facts of this case?

## Statute and Treaty Involved

Rule 50 of the Federal Rules of Civil Procedure is set forth in Appendix A to this brief. The pertinent provisions of the Convention for the Unification of Certain Rules Relating to International Transportation by Air and Additional Protocol,[1] concluded at Warsaw October 12, 1929, 49 *Stat.* 3000, T. S. 876, are set forth in the Petition at pp. 22a-24a.

## Statement

This litigation involves a suit for wrongful death brought by petitioners as Executors of the Estate of William Kapell. Petitioners' decedent was a passenger on an aircraft owned and operated by respondent British Commonwealth Pacific Airlines Limited (BCPA), which crashed

[1] This Treaty is commonly and hereinafter referred to as the Warsaw Convention.

on Kings Mountain, California, while on approach to San Francisco International Airport on October 29, 1953. All persons on board the aircraft, including petitioners' decedent, were killed. At the time, petitioners' decedent was traveling pursuant to a passenger ticket providing for transportation from New York to Sydney, Australia and return, with stops in each direction at San Francisco.

Since the decedent's transportation was international within the meaning of Article 1 of the Warsaw Convention, the rights of the parties at the trial were governed by the provisions of the Warsaw Convention. In the event of death of a passenger, the Warsaw Convention limits the liability of the carrier to the sum of $8,291.87 unless it is found that the accident was caused by the wilful misconduct of the carrier.

After a trial which consumed thirteen days, the jury returned a verdict for respondents on all issues. Specifically encompassed within this verdict was the finding by the jury that the accident and decedent's death were not caused by the wilful misconduct of respondents.

More than two years after the jury verdict was rendered, the District Court, per Judge Ritter, granted petitioners' post-trial motions for directed verdict and judgment notwithstanding the verdict in a lengthy opinion which is reported at 219 F. Supp. 289.[2] Judge Ritter, in this opinion, assumed the role of the jury as fact-finder, and held that the accident resulting in the death of petitioners' decedent was caused by the wilful misconduct of respondents *as a matter of law*. Judge Ritter directed the entry of judgment in favor of petitioners on the issue of liability and directed a new trial on the issue of dam-

[2] The full text of Judge Ritter's opinion is printed in defendants' Appendix in the Court below, commencing p. 34a.

ages only. Alternatively, Judge Ritter directed a new trial on all issues if the judgment *non obstante veredicto* were set aside on appeal.

On appeal, the Court below reversed the District Court's grant of judgment *non obstante veredicto,* reversed the alternative grant of a new trial as an abuse of discretion, and directed the entry of judgment upon the jury's verdict in favor of respondents. 346 F. 2d 532 at 542.

## ARGUMENT

As stated by the Court below, the primary question presented by this case is:

> "whether the trial court was justified in setting aside the jury's verdict in favor of defendant and, assuming the jury's role as fact finder, granting judgment to plaintiffs." 346 F. 2d 532 at 535-6.

No amount of slanted statement or legal dialectic on the part of petitioners can convert this case into one which would warrant review by this Court on certiorari. Throughout the Petition, there is evident a sustained effort on the part of petitioners to becloud the true issues involved in this case by repeated assertions of "speculation" on the part of the Court below, "shocking denial of justice", "disrespect for our judicial processes", "plaintiffs' Constitutional right to trial by an unprejudiced jury" and the "hodge podge" approach by the Court below to the case. When these clouds are brushed aside, it is evident that this case does not involve any issues of substantial importance to anyone but the parties to this action.

Petitioners requested the jury to find that the accident which resulted in their decedent's death was caused by

the wilful misconduct of respondents. All of the evidence presented to the jury by petitioners in support of this request was circumstantial. If the jury had drawn the inferences from this evidence urged by petitioners, then damages could have been assessed without limitation as to amount. If the jury did not draw the inferences requested by petitioners, but nonetheless concluded that respondents had not taken all necessary measures to prevent the accident within the meaning of Article 20 of the Warsaw Convention, then the jury could have found damages up to the amount limited by Article 22 of the Warsaw Convention, namely $8,291.87. Petitioners, however, requested the jury in summation not to return the limited damages, but to either award them unlimited damages or none. To award unlimited damages, the jury would have been required to infer from the circumstantial evidence presented by petitioners that the accident was caused by respondents' wilful misconduct. The jury refused to draw the inferences urged by petitioners and returned a verdict for respondents.

Petitioners seek to have this Court review the present case upon the basis of a new and unsupportable claim that the jury was prejudiced against petitioners. The bases asserted for this claim appear to be: (1) the charge to the jury by the trial court, which was characterized by the Court below as "most favorable to plaintiffs"; and (2) the admission in evidence of certain maintenance records *offered by petitioners.* Petition, pp. 14-15. See Defendants' Appendix in the Court below, pp. 381a-382a.

Petitioners also challenge the action of the Court below in reversing, as an abuse of discretion, the alternative grant of a new trial by the District Court. Petitioners in this regard assert that the Court below has exceeded its power and has so far departed from the accepted and

usual course of judicial proceedings as to call for this Court to intervene in order "to assure plaintiffs their 7th Amendment right to trial by an unprejudiced jury" (Petition, p. 11). As to the power of the Court below to reverse the alternative grant of a new trial, petitioners overlook the provisions of Rule 50 (c) of the Federal Rules of Civil Procedure. The opinion of the Court below clearly supports its reversal of the alternative grant of a new trial. Finally, the present assertion of petitioners that the jury was prejudiced against them cannot be supported by anything in the record.

The Court below properly refused to estop respondents from litigating the issue of wilful misconduct in this case upon the basis of a prior judgment in favor of the survivors of another passenger killed in this accident. As viewed by the Court below, under the particular circumstances of this case, neither Federal, California, nor New York law rendered the doctrine applicable. It is not without significance that the trial judge in the prior action,[3] which was tried in the Northern District of California, was Judge Ritter, who was sitting at that time in that Court by designation. The first trial in that action resulted in a jury verdict for defendants. Judge Ritter set this verdict aside, ordered, and thereupon conducted a new trial. When Judge Ritter appeared in the Southern District of New York, again sitting by designation, petitioners requested that this case be assigned to Judge Ritter.

The Court below, considering all of the facts and circumstances of this case, and the law of the only relevant jurisdictions, correctly concluded that respondents were free to relitigate the issue of wilful misconduct. 346 F. 2d at 541.

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[3] Petition, p. 8.

## I.

## The Decision Below Is Correct

The burden of proving wilful misconduct within the meaning of Article 25 of the Warsaw Convention rested upon petitioners. *Grey* v. *American Airlines, Inc.*, 227 F. 2d 282 (2d Cir. 1955), *cert. denied*, 350 U. S. 989 (1956). Almost all of the evidence before the jury on this issue was purely circumstantial. Upon the basis of this evidence, the jury refused to draw the inferences urged by petitioners and concluded that petitioners had failed to sustain their burden of proving wilful misconduct.

The District Court, however, rejected this verdict of the jury, assumed the jury's role as fact-finder, and concluded that the only permissible inference from the circumstantial evidence was that the accident was caused by the wilful misconduct of respondents. Accordingly, the District Court granted judgment *non obstante veredicto* to petitioners.

The Court below has reiterated the separate roles to be played by the jury with respect to the facts and by the District Court with respect to the law, as delineated by decisions of this Court. *Lavender* v. *Kurn*, 327 U. S. 645 (1946); *Tennant* v. *Peoria and Pekin Union Ry.*, 321 U. S. 29 (1944). Having done so, the Court below made a searching review of the entire trial record and concluded that there was no justification for the conclusion by the District Court "that the *only* permissible inference from all the evidence was that the pilot had been guilty of wilful mis-

conduct." 346 F. 2d at 537. The Court below went further and stated:

> *"We cannot even say that the pilot's or the airline's negligence was established as a matter of law, much less wilful misconduct.* Once the case went to the jury, its verdict should not have been upset if reasonable men could find in defendant's favor, as they certainly could here." 346 F. 2d at 538. (Emphasis added.)

The Court below analyzed the trial record, applied the controlling legal principles thereto, and properly concluded that the District Court erred in assuming the role of the fact-finder in this case. Since this action of the Court below is not only consistent with but required by controlling decisions of this Court, there is certainly no need for further review.

The action of the Court below in reversing the alternative grant of a new trial by the District Court was not only within the power of the Court, but, in view of the circumstances of this case, was required in the interests of justice. Not one reason was advanced by the District Court for its grant of an alternative new trial. The Court below, from its study of the trial court's opinion, concluded that the grounds relied upon must have been that the verdict was against the weight of the evidence and that defense counsel made misstatements in his argument to the jury. Both grounds have been carefully considered by the Court below and found to be entirely without merit.

The power of the Court below to reverse the alternative grant of a new trial in this case cannot be seriously challenged in view of the 1963 Amendment to Rule 50 of the Federal Rules of Civil Procedure. The Note of the Ad-

visory Committee accompanying the 1963 Amendment to Rule 50 states:

> "The party against whom the judgment n.o.v. was entered below may, as appellant, besides seeking to overthrow that judgment, also attack the conditional grant of the new trial. And the appellate court, if it reverses the judgment n.o.v., may in an appropriate case also reverse the conditional grant of the new trial and direct that judgment be entered on the verdict."

The action of the Court below is precisely that authorized and envisaged by the present Rule 50. Even prior to the 1963 Amendment to Rule 50, the grant of a new trial was reviewable in connection with the appeal from the judgment rendered at the conclusion of the second trial, where the trial judge had abused his discretion in awarding the new trial in the first instance. *Pettingill* v. *Fuller*, 107 F. 2d 933 (2d Cir. 1939), *cert. denied*, 309 U. S. 669 (1940); *Damanti* v. *A/S Inger*, 314 F. 2d 395 (2d Cir. 1963). The 1963 Amendment to Rule 50 enabled the Court below to reverse the alternative grant of a new trial at the same time and in conjunction with its reversal of the judgment *non obstante veredicto*.

There is no need for this Court to review the action of the Court below in reversing the alternative grant of a new trial as an abuse of discretion, since such action is authorized by Rule 50 and, as demonstrated by the opinion below, was entirely appropriate in this case.

## II.

## There Is No Conflict of Decision

Petitioners assert that there is a conflict created by the decision of the Court below with a decision of the Court of Appeals for the Ninth Circuit in *United Air Lines, Inc.* v. *Weiner*, 335 F. 2d 379 (9th Cir. 1964), *affirming United States* v. *United Air Lines, Inc.*, 216 F. Supp. 709, 725-7 (D. Nev. 1962), *cert. dismissed*, 379 U. S. 951 (1964). The asserted conflict arises by reason of the refusal of the Court below to apply the doctrine of collateral estoppel in this case, whereas the application of the doctrine by the District Court was affirmed in the *Weiner* case. 335 F. 2d at 404.

The District Court in the *Weiner* case was concerned with Nevada law, which governed the substantive rights of the parties to that litigation. Nevada law did not require mutuality of estoppel in tort cases, and the District Court in the *Weiner* case accordingly gave effect to the doctrine of collateral estoppel as part of the substantive law of Nevada. See 216 F. Supp. 709 at 726.

The Court below considered the question of the applicability of the doctrine of collateral estoppel under Federal, New York and California law. Nevada law was in no respect involved in the determination by the Court below of this question. Both California and New York require that there be mutuality of estoppel in order for the doctrine of collateral estoppel to be applicable in tort cases. *Nevarov* v. *Caldwell*, 161 Cal. App. 2d 762, 327 P. 2d 111 (1958); *Elder* v. *New York and Pennsylvania Motor Express, Inc.*, 284 N. Y. 350 (1940); *Quatroche* v. *Consolidated Edison Co. of New York, Inc.*, 11 A. D. 2d 665 (1st Dep't. 1960); *Ayala* v. *Airborne Transport, Inc.*, 282 App. Div.

486 (1st Dep't. 1953). Since petitioners were not parties to the prior action in California, and would not have been barred from prosecuting the present suit by reason of a judgment in favor of respondents in the prior action, respondents were free to litigate the issue of wilful misconduct in this case. Thus, in the *Weiner* case, the substantive law of the State of Nevada was applied, and in the present case, the substantive law of the States of California and New York was considered.

No conflict of decision exists where two different Circuit Courts of Appeal give effect to the substantive laws of different States, even though this may lead to different results. Contrary to the assertion of petitioners that there is a conflict between the *Weiner* case and the decision of the Court below, the decisions of these two Circuit Courts of Appeal are entirely consistent in that they both give effect to the substantive law of the State wherein the District Court was sitting.

The Court below has carefully considered the question of whether the doctrine of collateral estoppel is applicable in this case in the light of Federal, New York and California law, and has correctly concluded that regardless of which body of law is determinative of this question, respondents were free to relitigate the question of wilful misconduct in this case. Thus, not only is there no conflict of decision created by the Court below with the *Weiner* case, but the decision of the Court below is correct in all respects. Accordingly, there is no need for this Court to consider this question.

## III.

## There Is No Question of Federal Law

The decision of the Court below raises no question of Federal law which would require review by this Court. No construction of any provision of the Warsaw Convention was necessary to the decision of the Court below, since under the evidence presented, a finding of ordinary negligence, let alone wilful misconduct, was not required of the jury. See 346 F. 2d at 538.

Petitioners now attempt to create an issue involving the construction of Article 3 of the Warsaw Convention by asserting in their Petition, for the first time in this litigation, that the passenger ticket of decedent omitted an "agreed stopping place", and that there was consequently no delivery of a passenger ticket within the meaning of Article 3. Not only is this position legally unsound, but it is factually unsupportable. Appendix G to the Petition sets forth the contract of transportation between respondent BCPA and petitioners' decedent. The only stopping places agreed to between the parties to this contract of transportation were, as expressly stated in the contract, San Francisco, Sydney, and again, San Francisco. Thus, there was no omission of an "agreed stopping place".

In any event, it is clear from paragraph (2) of Article 1 of the Warsaw Convention, 40 *Stat.* 3014, that the significance of naming an "agreed stopping place" is to enable the parties to determine whether the transportation involved is international. Decedent's transportation was clearly international, since his ticket provided for transportation from New York to San Francisco to Sydney to San Francisco to New York. The inclusion of Honolulu

in the contract, therefore, would not have altered the nature of the transportation contracted for in any respect. Finally, Article 3 paragraph (2) of the Warsaw Convention expressly provides that the irregularity of the passenger ticket does not affect the application of the Warsaw Convention to the rights of the parties.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 15, 1965

## APPENDIX A

### Federal Rules of Civil Procedure

**Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.**

(a) *Motion for Directed Verdict: When Made; Effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury. As amended Jan. 21, 1963, eff. July 1, 1963.

(b) *Motion for Judgment Notwithstanding the Verdict.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the

alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial. As amended Jan. 21, 1963, eff. July 1, 1963.

(c) *Same: Conditional Rulings on Grant of Motion.*

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict. Added Jan. 21, 1963, eff. July 1, 1963.

(d) *Same: Denial of Motion.* If the motion for judgment notwithstanding the verdict is denied, the party who

prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted. Added Jan. 21, 1963, eff. July 1, 1963.